120-489

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1295.~~ 816

SABINE ROBBINS, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED DECEMBER 24, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1235.

SABINE ROBBINS, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Supreme Court of the United States.

Know all men by these presents that we, Sabine Robbins and Edwid Whitmore, are held and firmly bound unto the Taxing District of Shelby County in the sum of five hundred dollars, to be paid to the Taxing District of Shelby County, executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 25th day of September, 1884.

Whereas the above-named Sabine Robbins hath prosecuted a writ of error to the Supreme Court of the United States to
2 reverse the judgment rendered in the above-entitled action by the supreme court of the State of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Sabine Robbins shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

SABINE ROBBINS. [SEAL.]
By F. T. EDMONDSON, *Att'y.*
E. WHITMORE. [SEAL.]

Acknowledged before me this 25th day of Sept., 1884.
BELL W. ETHERIGE, *Clerk.*
W. B. WEISIGER, *D. Clerk.*

Approved by me this 29 Sep., 1884.
JAS. W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

3 E. Whitmore, surety on this bond, makes oath in due form of law that he is worth five hundred dollars in property subject to execution in his own name, right, and title, free and unencumbered, after paying all debts within the jurisdiction of this court, consisting in the following-described property, to wit, Ledger office and other property.

E. WHITMORE.

Subscribed and sworn to 25 day of Sept., 1884.
W. B. WEISIGER,
D. Clerk U. S. Cir. C't, W. D. T.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said supreme court of Tennessee before you, between Sabine Robbins, plaintiff, and The Taxing District of Shelby County, Tennessee, defendant, a manifest error

hath happened, to the great damage of the said Sabine Robbins, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1884, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 25th day of September, A. D. 1884, and 10 of American Independence.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

4½ The execution of this writ of error appears by the transcript hereto attached.

This 13th day of Oct., 1884.

JNO. W. BUFORD, *Clk,*
By G. E. O'CONNOR, *D. C.*

5 STATE OF TENNESSEE:

Pleas at a term of the circuit court of Shelby county begun and held at the court-house, in the taxing district, on the third Monday in March, 1884.

Present and presiding: The Hon. James O. Pierce, judge, &c.; also present: Joseph Uhl, clerk of said court, and W. D. Cannon, sheriff of Shelby county.

Warrant.

TAXING DISTRICT SHELBY COUNTY, STATE OF TENNESSEE.

Before me this day personally appeared G. T. O'Haver, and made oath that S. Robbins did, on the 4th day of Feb'ry, 1884, in said district, and within the jurisdiction of the police court of the taxing district aforesaid, commit the offence of doing business as
6 drummer without license, contrary to law and the ordinances of said district.

G. T. O'HAVER.

Sworn to and subscribed before me 4 day of February, 1884.

D. P. HADDEN,
President of Fire and Police Commissioners.

Taxing District Shelby County, State of Tennessee, to any officer of the police:

Information on oath having been made to me that the offence of doing business as drummer without license has been committed within the taxing district, in violation of the ordinances of said district, and accusing S. Robbins thereof, you are therefore commanded in the name of the president of the fire and police commis-
7 sioners of the taxing district to arrest S. Robbins and bring him before the president of fire and police commissioners, in the taxing district and county of Shelby, to answer the charge.

This 4 day of February, 1884.

D. P. HADDEN,
President of Fire and Police Commissioners.

Endorsement: "Issued Febr'y 4, 1884. Executed Febr'y 4, 1884, by arresting the within-named person. P. S. Simons, officer."

Judgment.

The President of Fire and Police Commissioners of the Taxing District, Shelby County.

STATE OF TENNESSEE *vs.* S. ROBBINS.

8 It is considered by me in this case that the defendant, S. Robbins, is guilty of doing business as drummer without license, as charged in the warrant, and that he pay a fine of $50.00, and in default of payment of said fine that he be committed to the work-house, the district prison, until said fine and costs be paid,

(Not signed,)
President of Fire and Police Commissioners.

Appeal Bond.

Know all men by these presents that we, S. Robbins, principal, and E. Whitmore, surety, are held and firmly bound unto the Taxing District of Shelby County, Tennessee, in the sum of two hundred and fifty dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, and assigns.

Witness our hands and seals this 5th day of February, 1884.

9 The condition of the above obligation is such that whereas the said S. Robbins was arraigned before D. P. Hadden, the president of fire and police commissioners of said district, on the 5th day of February, 1884, upon a charge of drumming without a license, in violation of the ordinances of the said district, and was found guilty as charged, and fined fifty dollars and costs, from which judgment of said president he prayed and obtained an appeal to the next term of the circuit court of Shelby county, to be held at the court-house thereof, on the third Monday in May, 1884: Now, if the said S. Robbins shall prosecute his said appeal successfully, or, in case of failure, shall abide by and perform the judgment of said

circuit court of Shelby county in the premises, then this obli-
10 gation to be void; otherwise to remain in full force and effect.

S. ROBBINS. [SEAL.]
E. WHITMORE. [SEAL.]

Approved.

D. H. HADDEN,
President of Fire and Police Commissioners.

Endorsed: "Bond and warrant filed Feb'ry 18th, 1884. Geo. J. Campbell, D. C."

And, to wit:

March Term, 1884.

THE PRESIDENT OF POLICE AND FIRE COMMISSIONERS OF THE TAXING DISTRICT OF SHELBY COUNTY, TENN., D. T.
vs.
S. ROBBINS. } 8073.

SATURDAY, *the 29th day of March*, 1884.

Come the parties, by their attorneys, and this case being
11 this day heard by the court upon an agreed statement of facts filed with the papers, and having considered the same, and being fully advised as to the law, the court finds for the plaintiff, and assesses a fine against the defendant for the offense charged in the warrant of ten dollars. It is, therefore, considered by the court that the plaintiff recover of the defendant the sum of ten dollars, together with the State and county tax, and of the defendant and E. Whitmore, his surety on appeal bond, the costs herein, and execution will issue accordingly.

As a part of this judgment it is ordered that, on failure of defendant to pay the fine and costs herein, he be rearrested and turned over to the police authorities of the taxing district, to be dealt with as other offenders found guilty before the president of fire and police commissioners.

12 And, to wit:

Order Filing Bill of Exceptions.

March Term, 1884.

TAXING DISTRICT, T. D.,
vs.
S. ROBBINS. } No. 8073.

MONDAY, *March* 31st, 1884.

The defendant tendered to the court his bill of exceptions in this case, which is signed by the judge presiding, and ordered to be filed as part of the record herein.

Bill of Exceptions. Filed March 31st, 1884.

TAXING DISTRICT, &c., T. D., *vs.* S. ROBBINS. } No. 8073.

On the trial of the above-styled cause before the court, and without the intervention of a jury, the following evidence was submitted:

13 *Agreed Statement of Facts. Filed March 29th, 1884.*

TAXING DISTRICT, T. D., *vs.* SABIN ROBBINS. } No. 8073.

Facts admitted.

Sabin Robbins is a citizen and resident of Cincinnati, Ohio, and on the — day of ——, 1884, was engaged in the business of drumming in the Taxing District of Shelby county, Tenn.—*i. e.*, soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of "Rose, Robbins and Co.," doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio. While engaged in the act of drumming for said firm, and for the claimed offence of not having taken out the required license for doing
14 said business, the def't, Sabin Robbins, was arrested by one of the Memphis or taxing district police force and carried before the Hon. D. P. Hadden, president of the taxing district, and fined for the offence of drumming without a license. It is admitted the firm of "Rose, Robbins and Co." are engaged in the selling of paper, writing materials, and such articles as are used in the book stores of the Taxing District of Shelby Co., and that it was a line of such articles for the sale of which the said def't herein was drumming at the time of his arrest.

F. T. EDMONDSON,
Att'y for Def't.
S. P. WALKER,
For Taxing District.

This was all the evidence, and thereupon the court, upon the evidence, rendered judgment against the defendant, to which the
15 defendant excepted, and thereupon defendant, as shown by the record, moved for a new trial, which was refused, and to which he excepted.

The defendant now tenders this his bill of exceptions to the action and rulings aforesaid, and the same is signed and made a part of the record this 31st day of M'ch, 1884.

JAMES O. PIERCE, *Judge.*

Order Granting Appeal.

March Term, 1884.

TAXING DISTRICT, T. D., *vs.* S. ROBBINS. } 8073.

TUESDAY, *April 1st*, 1884.

Defendant prays an appeal in the nature of a writ of error to the next term of the supreme court to be held for the western division of the State of Tennessee, and, having executed an appeal bond with surety, the same is granted.

16 *Appeal Bond.*

Know all men by these presents that we, S. Robbins, principal, E. Whitmore, surety on appeal bond, and F. T. Edmondson, surety herein, are held and firmly bound unto The Taxing District, its successors and assigns, in the penal sum of two hundred and fifty dollars, for the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our heirs, executors, administrators, and assigns, both jointly and severally, firmly by these presents. Sealed with our seals, and dated this 31 day of March, A. D. 1884.

But the condition of the above obligation is such that whereas the above-bounden S. Robbins this day prayed and obtained an appeal,
17 in the nature of a writ of error, to the next term of the supreme court to be held for the western division of the State of Tennessee, at Jackson, on the first Monday in April, 1884, from a judgment which the said Taxing District obtained against him in the circuit court of Shelby county, at the March term, and on the 29 day of March, 1884, for ten dollars and costs of suit:

Now, if the said appellant prosecute his said appeal with effect, or in case he fail therein do pay and satisfy, abide by, and perform the judgment, order, or decree of the said Supreme Court to be had therein, and all such costs as may be awarded against him for wrongfully prosecuting said appeal, or in any event shall pay all costs which may at any time be adjudged against him in the cause
18 in said Supreme Court, then this obligation to be void; otherwise to remain in full force and effect.

S. ROBBINS,
By F. T. EDMONDSON, *Att'y.* [SEAL.]
E. WHITMORE. [SEAL.]
F. T. EDMONDSON. [SEAL.]

Endorsed: "Filed 1st day of April, 1884. Geo. J. Campbell, D. C."

STATE OF TENNESSEE:

I, Joseph Uhl, clerk of the circuit court of Shelby county, hereby certify that the foregoing 13 pages of words and figures contain a full, true, and complete transcript of all the records and proceedings

had in the suit therein named, wherein The Taxing District of Shelby County [is] plaintiff and Sabin Robbins [is] defendant, as the same appears of record and on file in my office.

In testimony whereof I hereunto subscribe my name and
19 affix the seal of said court, at my office in the taxing district of Shelby county, this the 1st day of April, 1884.

[SEAL.] JOSEPH UHL, *Clerk.*
GEO. J. CAMPBELL,
Deputy Clerk.

20 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, on the first Monday of April, 1884—present, the Hon. Jas. W. Deaderick, chief justice, and J. B. Cooke, Wm. F. Cooper, Thos. J. Freeman, and PeterTurney, judges—to wit:

S. ROBBINS
v.
THE TAXING DISTRICT, SHELBY, T. D. } No. 970.

SATURDAY, *June 11th*, 1884.

This cause was heard upon the transcript of the record from the circuit court of Shelby county, and it appearing to the court that in the same there is no error, it is therefore considered by the court that said judgment be in all things affirmed, and that defendant recover of plaintiff the sum of $10.00, the amount of the fine
21 assessed against him in the court below, together with the State and county tax on this litigation, and of him and E. Whitmore, surety on cost bond, the costs of the court below, and of plaintiff and E. Whitmore and F. T. Edmonds, sureties on appeal bond, the costs of this court, for which let execution issue.

And on, to wit, June 14th, 1884, the following opinion was delivered:

Syllabus.

S. ROBBINS *v.* TAXING DISTRICT.

The act of 1881, ch. 96, § 16, amending the taxing-district
22 law, which provides that drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares, and merchandise therein by sample shall be required to pay a specified privilege tax, is constitutional and valid.

Opinion.

S. ROBBINS *v.* TAXING DISTRICT.

The plaintiff in error, a citizen of Cincinnati, Ohio, is a drummer for the firm of Rose, Robbins & Co., of the same place, the firm being engaged in selling paper, writing materials, and such articles as are used in the book stores of the taxing district of Shelby county,

a municipal corporation commonly known as the city of Mem-
23 phis. He has appealed from a judgment against him for plying his vocation by selling by sample within the taxing district, without taking out a license for the purpose, goods to be furnished by his employers. It is insisted on his behalf that the act of the Legislature imposing the privilege tax claimed is unconstitutional.

Selling by sample was first made a privilege in this State by the revenue act of 1871, ch. 51, § 6, and the provision was repeated in the act of 1873, ch. 118, § 46. The power of the Legislature to create a privilege for purposes of taxation and to authorize its taxation by municipal corporations is not denied. French *v.* Baker, 4 Sneed, 193; Mayor, &c., *v.* Grest, 3 Head., 413. To enable any person to
24 exercise the privilege thus created he must of course comply with the requirements of the law or ordinances, whether he be a resident or non-resident of the State. Howe Machine Co. *v.* Cage, 9 Baxt., 518; Robertson *v.* Heneger, 5 Sneed, 257; Lightburn *v.* Taxing District, 4 Lea, 219; Singleton *v.* Fritsch, 4 Lea, 93. The Legislature may classify merchants or other dealers for purposes of taxation. Vosse *v.* Memphis, 9 Lea, 294; Eastman *v.* Jackson, 10 Lea, 162. It may classify for like purposes the same vocation. State *v.* Schlier, 3 Heisk., 281; Fulgum *v.* Mayor, &c., 8 Lea, 635. And may impose a privilege tax, in addition to a regular occupation tax, and make it different for different classes of the same occupation. Tally *v.* Dwyer, 7 Lea, 180; Jenkins *v.* Ewin, 8 Heisk., 456.

The act of 1879, ch. 84, which created the taxing district of
25 Shelby county, provided by § 7, sub. § 50: "All persons not having a regular licensed house of business in the taxing district and selling goods, wares, and merchandise therein by sample, shall be required to pay a specified privilege tax." The statute in substance made it a privilege for persons not having a regular house of business in the district, whether a resident or non-resident of the State, to sell by sample within the district or corporate limits of the municipality. The Legislature having the power to classify merchants, as we have seen, and to add on to any class of merchants a privilege tax, the validity of the legislation would seem to follow of course. Resident merchants shall pay a regular occupation
26 tax, but travelling salesmen of other merchants, who otherwise pay no tax, shall pay a privilege tax.

The act of 1881, ch. 96, § 16, is: That subsection 50 (of 1879, ch. 84, § 7) be amended to read as follows: All drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay a specified tax. The change is in words, not in substance. The business of a drummer, if the latter be correctly defined as an agent who sells by sample, was embraced in the original provision.

The term drummer, this court has said, "has acquired a common acceptation, and is applied to commercial agents who are
27 travelling for wholesale merchants and supplying the retail trade with goods, or rather taking orders for goods to be

shipped to the retail merchant." Singleton *v.* Fritsel, 4 Lea, 96. More accurately, perhaps, a drummer is a travelling agent who sells or offers to sell by sample, by representation of his employer's goods, or by soliciting orders. He would in any event be a person selling by sample. The meaning of the statute is that any person not having a regular licensed house of business in the district must pay a privilege tax for selling, or offering to sell, by sample in the district. The statute merely creates a new privilege by designating a separate and distinct class of traders, who shall be required to take out
28 a license in order to ply their business. It makes no discrimination between persons of that class or against non-residents of the State. It only provides that the particular class shall pay a privilege tax to the local government where they do business which class would otherwise pay nothing.

There is nothing to impeach the validity of this legislation in the opinion of this court in the Mayor, &c., of Nashville *v.* Althrop, 5 Cold., 554. At the time of the passage of the municipal ordinance in controversy in that case the Legislature of the State had not made selling by sample a taxable privilege nor authorized the corporation of Nashville to tax merchants or other traders except gen-
29 erally as one class. The city of Nashville undertook, by ordinance in advance of State legislation, to make the business of selling goods by sample in the city a separate avocation, and taxable as such, and, by another section of the ordinance, to require all merchants of other cities and their agents, and all other non-residents of the city, whether manufacturers, merchants, or other dealers, who may offer goods for sale in the city, either by sample, representation, or the taking of orders, to obtain a license, with a proviso that the ordinance should not be so construed as to impose any additional tax or disability upon the merchants of the city. It was held, and correctly, as this court has since said in Vosse *v.* Memphis, 9
30 Lea, 297, that municipal corporations "have no powers to create a privilege for the purpose of taxing it, or to discriminate between persons exercising the same privilege by imposing a tax on one class at a higher rate or in a different mode or upon other principles than one applicable to the exercise of the same privilege by others;" that is, adds the judge in the subsequent case of Vosse *v.* Memphis, "of the same class," citing, in support of the qualification, the State *v.* Schlier, 8 Heisk., 455, and his own opinion in Fulgum *v.* Mayor, &c., 8 Lea, 635. These cases settle that the Legislature may divide merchants or other dealers into classes for the purpose of separate taxation, and may authorize munici-
31 pal corporations to make the same division. The Legislature, by the statute under consideration, has now done what the municipality could not itself previously do, and created a privilege of a specified part of a general business which might otherwise have been carried on under the usual occupation license for purposes of taxation.

This was, as we have repeatedly held, within the competency of the Legislature.

It was said in Althrop's case that the second section of the ordinance in controversy was open to the further objection that it discriminated between merchants, manufacture-s, and other dealers trading without the limits of Nashville and members of the
32 same class residing in the city. "This," it was added, "cannot be done, and would be equally beyond the authority of either the State or the municipal Legislature." The reason is, as stated by Judge Cooley in the paragraph cited from his work on Constitutional Limitations, that a statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. But this statute makes no discrimination among or between the individuals of the class covered by it, the class being not merchants generally, but travelling agents of
33 non-resident houses doing business within the city. And under our decisions it is sufficient if all persons in the same class must pay the same tax for the privilege. Fulgem *v.* Mayor, &c., 8 Lea, 640,

It is said, however, that persons having a regular licensed business house in the district may sell by sample within the district without taking out the license, under the statute, and therefore there is a discrimination in their favor. The record does not show that any person having a licensed house of business in the district ever sell by samples therein, and it is not easy to see how such a mode of selling could exist where the goods themselves were on hand in the district.

And if a resident merchant undertook to sell goods to be
34 ordered from a distance, we have expressly held in the case of a merchant tailor that he would be liable for the regular occupation tax. (Sengleton *v.* Fritsch, 4 Lea, 93.) But if the fact be conceded that resident merchants do sell their own goods by sample within the district, the fact [that] they are exempted from the special privilege tax would not make the latter a partial law. The Legislature, we have also expressly held, may make exemptions of individuals of a class from a special tax without affecting the validity of the tax law. (Fulgem *v.* Mayor, 4 Lea, 93.) In that case a license tax was imposed by ordinance upon the privilege of keeping a hotel proportioned to the rental value, hotels having
35 less than ten rooms being exempted. In the case of the Pullman Sleeping-Car Co. *v.* Gaines, 3 Tenn., ch. 587, the act of 1877, ch. 16, § 6, was considered, which provided·

"That the running and using of sleeping-cars on railroads in Tennessee, not owned by the railroad upon which they are run and used, is declared to be a privilege" and taxed. The statute clearly exempts the owners of the railroads from the tax, and the question was presented which is now made in this case, whether the exemption did not make the act amenable to the constitutional objection that it was a partial law. It was held, however, that the Legislature

merely intended by the language used to exclude the idea of
36 interfering with the franchises of the railroads granted by their charters, the law presuming that the company has paid, in taxation or otherwise, for the franchises thus conceded. So here, if, in fact, selling by sample within the municipality is a part of the business of the resident merchant, his regular occupation license would cover it. The person not having such a licensed place of business must pay the privilege tax; and, as we have seen, a privilege tax may be added to an occupation tax of a class of merchants or traders. Kelly *v.* Dwyer, 7, Lea, 180; Jenkins *v.* Ewin, 8 Heisk., 456; Vosse *v.* Memphis, 9 Lea, 294.

There is nothing in the suggestion that the act under con-
37 sideration is unconstitutional because it makes the selling by sample a privilege in the taxing district alone, and not in other parts of the State. The Legislature has the power to create municipal corporations by general law and clothe them with authority to levy local taxes, and we have held the taxing district act to be a general law.

That such a tax is not a regulation of commerce between the States is well settled. Osborne *v.* Mobile, 16 Wall., 479; Lightburn *v.* Taxing District, 4 Lea, 219; Pullman Car Co. *v.* Gains, 3 Tenn., ch. 587.

Judgment affirmed.

COOPER, *J.*

38 United States of America to the Taxing District of Shelby County, Tennesse, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1884, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, in Jackson, in the western division of the State of Tennessee, wherein Sabine Robbins is *are* plaintiff and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Jas. W. Deaderick, chief justice of the supreme court of the State of Tennessee, this 29 day of Sept., 1884.

JAS. W. DEADERICK,
Chief Justice of the Supreme Court of Tennessee.

39 [Endorsed:] Service of the within acknowledged Oct. 11 1884. S. P. Walker, att'y for Taxing District.

40 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State, for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the record & proceedings in the case of S. Robbins against The Taxing District as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office in the city of Jackson, on this the 13th day of October, A. D. 1884, and of the Independence of the United States the 109th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By G. E. O'CONNOR, *D. C.*

Endorsed on cover: Tennessee supreme court. No. 1235. Sabine Robbins, plaintiff in error, *vs.* The Taxing District of Shelby County, Tennessee. Filed December 24, 1885.

120-489

SABIN ROBBINS,

PLAINTIFF IN ERROR,

vs. } No. 1235.

TAXING DISTRICT OF SHELBY COUNTY,

DEFENDANT IN ERROR.

The following extracts from the Revenue Laws of Tennessee embrace everything bearing on the matters in controversy. We do not print them in full because they are very voluminous:

ACTS OF 1879—CHAPTER LXXXIV.

SECTIONS 7, 8, 9 AND 10—PAGE 104

Privilege taxes for the Taxing District

SEC. 7. *Be it further enacted*, That the following named kinds of business and occupations be and the same are hereby declared taxable privileges, and shall be taxed as herein provided, and the exercising of any of said privileges without first paying the tax hereby fixed, shall be a misdemeanor:

1. Every auctioneer, or firm of auctioneers, doing business at one place only, per annum, $75.00.

2. Every person offering to sell patent rights, per annum, $50.00, payable quarterly.

3. Every keeper of a game or fish store, for each store, per annum, $50.00.

4. Every person or firm having a merchants' license, who furnishes oysters or other refreshments, as they may be called for, in addition to the merchants' license, $25.00 annually.

5. Every keeper of a snack-house or coffee stand, per annum, $25.00.

6. Every keeper of a restaurant, per annum, $100, but the license to keep a restaurant shall not authorize the sale or gift to guests or others of any spirituous, vinous or malt liquors, lager beer, ale, porter, cider, or any light wines, nor tobacco, nor cigars; and every person selling or giving away any of the said articles in or about his or her restaurant shall first obtain the license therefor, as herein prescribed, in addition to their restaurant license.

7. Every club-room, where liquors of any kind are kept, per annum, $50.

8. Every keeper of a pleasure or beer garden, wherein spirituous, vinous or malt liquors are sold by the drink, or are drank upon the premises, per annum, $50.00.

9. Every keeper of skids or tarpaulins to hire, per annum, $60.

10. Every keeper of a house or yard for the sale of fire-wood, for each house or yard, per annum, $20.00.

11. Every keeper of second-hand articles for sale, per annum, $50.

12. Every keeper of a junk or rag store, per annum, $100.

13. Every hawker, or peddler of goods, wares or merchandise of any kind, per annum, $50.00, or $15 per quarter of three months.

14. Every keeper of a fruit-stand, per quarter of three months, $5.00; per annum, $20.00.

15. Every fruit peddler other than producer, per quarter of three months, $5; per annum, $20.00.

16. Every person or firm keeping an intelligence office, or acting as a labor broker, per annum, $50.

17. Every dealer not otherwise specified in this Act, except newsdealers, whatever he may deal in, who keeps no liquors of any kind, (druggists excepted), per annum, $50.00.

18. Every person, firm or corporation, dealing regularly in exchange, or keeping an exchange office in the taxing district, annually, $100.

19. Every street railroad for every car running within the district per annum, one-horse, $20; two-horse, $30.

20. Every owner of a cart, wagon or dray, or other vehicle drawn by one horse or other animal, for each, per annum, $5.00.

21. Every owner of the vehicles, mentioned in the last paragraph, drawn by two horses, or other animals, for each, per annum, $7.50.

22. Every owner of the vehicles, mentioned in the last two paragraphs, drawn by three or more horses or other animals, for each, per annum, $10.00.

23. Every owner of omnibuses, hacks, carriages or other vehicles seeking custom upon the streets, or visiting the railroad depots or steamboat landing, or other public places for the purpose of procuring custom, for each vehicle drawn by two horses or other animals, $10 per annum, and for each vehicle drawn by three or more horses, or other animals, $15.00 per annum.

24. Every owner of a carriage or other vehicle, kept exclusively for use at funerals, for hire, for each vehicle per annum, $10.00.

25. Every owner of wagons or other vehicles whether residing in the district or not, kept or used for the free delivery of goods, wares, merchandise or chattels to customers or others in the district, for each vehicle the same tax that is herein charged for vehicles of a corresponding

description which run for hire; and all corporations, associations or firms, by partnership, owning drays, transfer wagons, carts or any vehicle known by any other name and used for transferring raw or manufactured articles, shall pay the same tax as all other owners pay for like vehicles; *Provided*, however, that no tax shall be required of the original vendor or producer of the products of the soil or dairy, raised or produced by himself.

26. Every keeper of a hand express cart, for the delivery of parcels, for each vehicle per annum, $3.00

27. Every public concert for private profit or gain, for each twenty-four hours, $10; or $40 per week.

28. Every traveling or local minstrel company exhibiting for profit, for each twenty-four hours, $15.00; or $50 per week.

29. Every regular or opera troupe, for each exhibition, $25; or $100 per week.

30. Shows or exhibitions within doors, for gain, not otherwise taxed herein, $10 for each twenty-four hours; or $50 per week.

31. Each and every chiropodist and veterinary surgeon, and each and every dentist practising his profession in the taxing district, shall pay annually, $10.00.

32. Every person who shall, by permission of the President of the Board of Fire and Police Commissioners, give a public ball or dance or other like entertainment, whereat spirituous, vinous or malt liquors are sold by the glass, or are drunk on the premises, for each twenty-four hours, or for each ball or other like entertainment, not continuing longer than twenty-four hours, $25.00.

33. Every keeper of a shooting gallery per annum, $50.00.

34. Every keeper of a shed, yard or barn, used for taking care of horses, cattle or other animals or wagons

or other vehicles, for gain or profit for each per annum, $50.

35. Every person, association or company, operating an odorless excavator, shall be required to pay tax or license of $200 for the privilege and use of the dump provided by the district and its water privileges per annum, and on payment of said license, the company shall be exempt from the usual tax on wagons used for that purpose.

36. Steamboat agents and the agents of railroad companies, other than the proper officers of railroad terminations at the taxing district, shall pay a privilege tax of $25.00 per annum, and fees and a separate privilege tax shall be paid for each road represented.

37. Express companies transporting goods, &c., to distant points shall pay an annual tax of $300 besides the tax on vehicles.

38. Upon the privilege of crying auction sales, $20.

39. Upon the privilege of doing business as a broker, $250.

40. Upon the privilege of keeping a butcher's stall or house for selling butcher's meat elsewhere than at the market house, $50.

41. Upon the privilege of keeping, for the purpose of public amusement or profit, Jenny Lind, pool or billiard tables, on each table an annual license of $15, and on each bagatelle table, $15 per annum.

42. Upon the privilege of keeping a livery, sale or boarding stable, having twenty stalls or under, $30; and for each additional stall until the whole number shall reach forty, $1; and for every additional stall above forty, 50 cents.

43. Upon the privilege of keeping a hotel or tavern, $25; and one per cent. on the actual or estimated rental value of the same, said estimated rental value to be determined by the Legislative Council of the taxing district.

[This Act shall not be so construed as to apply to boarding-houses, small hotels or taverns, having less than ten sleeping rooms.]

44. Upon the privilege of exhibiting in the taxing district a circus and menagerie, or either, $50 per day, for each.

45. Upon the privilege of exhibiting any show, feats of agility, sleight-of-hand, or exhibition of amusement for which money is taken, except scientific lectures or exhibitions of the sciences or arts, or exhibitions for charitable purposes, $5, for each exhibition.

46. Each and every telegraph company, having an office in the taxing district, annually the sum of $100.

47. Each cattle dealer, annually the sum of $25.

48. Each claim agent, annually the sum of $50.

49. Each sewing machine establishment or agency, the sum of $100.

50. All persons not having a regular licensed house of business in the taxing district and selling goods, wares or merchandise therein by sample, shall be required to pay to the County Trustee the sum of $10 per week, or $25 per month, for such privilege; and no license shall be issued for a longer period than three months.

51. Upon the privilege of retailing spirituous, vinous, firmented or malt liquors, the sum of $50 per annum, and the same as other merchants upon the capital so employed.

52. Upon the privilege of keeping a theatre, opera-house, or concert hall, where theatrical entertainments are given, $100 per annum, payable qnarterly in advance.

53. Upon the privilege of opening or establishing an insurance office or agency, for the insurance of fire, life or accident, in the taxing district, for companies not chartered by the laws of the State of Tennessee, $200 per annum for each company represented, payable quarterly in advance.

54. Upon the privilege of opening or establishing an office or agency, for the insurance of life, fire or accident, in the taxing district, for companies chartered by the laws of the State of Tennessee, a privilege tax of $200 per annum, payable in advance; *Provided*, on said privilege tax a credit shall be given for the amount paid on the *ad valorem* principle.

55. Each real estate broker or firm of brokers, or rental agents, the sum of $50 per annum.

56. Upon the privilege of selling goods at a boat or other water craft, and not licensed as other merchants are taxed, at the rate of 1 per cent. on the wholesale price of the stock of goods on hand for sale.

57. Any person, firm or association, not having a regular licensed house of business in the taxing district and doing a receiving and forwarding business, shall obtain license from the Register, after first paying to the County Trustee the sum of $25 annually.

58. Any person, firm or corporation, engaged in the manufacture of cotton seed or other oils, the sum of $50 as a privilege tax.

SEC. 8. *Be it further enacted*, That there is hereby assessed a tax on all privileges not herein specifically enumerated, a tax equal to the tax assessed for State purposes, the same to be collected as other privilege taxes are collected. Any and all licenses issued shall be for the sole and exclusive benefit of the party in whose name and for whose benefit such license shall be issued, and shall not be transferable by the owner or holder thereof to any person whatever, under any pretense whatever, until the owner of such license shall apply to the Trustee to transfer the same, which transfer may be made by the Register of the taxing district; *Provided*, the owner of the same first pays to the Trustee the tax he may owe to the district, from the date of said license up to the time said transfer is made and all license for which specific sums are charged and not issued upon giving bond and

may be transferred by said Register of the taxing district without the rendition of an account. The fee for transfer shall be in each case two dollars ($2) for use of the district, for said transfer.

SEC. 9. *Be it further enacted*, That no license which may be issued shall embrace or authorize more than one business pursuit or avocation, and all persons desiring to pursue or carry on more than one pursuit or avocation shall take out a separate and distinct license for each pursuit, and pay the full tax required by law for each one. Each and every person obtaining a license shall when called upon by a police officer exhibit the same to him, and on failure to do so shall be fined in a sum not less than $5, nor more than $25.

SEC. 10. *Be it further enacted*, That each and every person exercising any of the branches of business or occupations hereinbefore taxed, without having first paid the tax thereon, or having obtained the license required to be taken out, shall be guilty of a misdemeanor, and upon arrest and conviction thereof, before the President of the Board of Police and Fire Commissioners, shall be fined for each separate offense not less than five nor more than fifty dollars.

The following is a copy of sections 8 to 23 inclusive, of chapter 96, Acts of 1881, amending the foregoing Act of 1879:

ACTS OF 1881—CHAPTER XCVI.

PAGE 113

SEC. 8. *Be it further enacted*, That subsection 2 of section seven (7), mentioned in the caption of this act, be so amended as to read as follows: Every person offering to sell or selling any patented article, per annum, $50, payable quarterly in advance; *Provided*, that the inventor himself shall pay no license tax for sales made by himself of his patent right or his patented article.

SEC. 9. *Be it further enacted,* That subsection seventeen (17), mentioned in the caption of this act, be made subsection fifty-nine (59) of section seven (7), and the following be inserted as subsection seventeen (17): Every person or firm dealing in cotton, or any other article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, ($50) fifty dollars per annum, and in addition, every such person or firm shall be taxed *ad valorem* (10 cts) ten cents on every one hundred dollars of amount of capital invested or used in such business; *Provided, however,* that if such person or firm carry on the cotton or other business in connection with the grocery or any other business, the capital invested in both shall only be taxed once, but such person or firm must pay the privilege tax for both occupations; *And provided, further,* that if the persons taxed in this subsection have no capital invested, they shall pay 2½ per cent. on their gross yearly commissions, charges, or compensations for said business, and at the time of taking out their said license, they shall give bond to return said gross commissions, charges, or compensation to the trustee at the end of the year; and at the end of the year they shall make return to said trustee accordingly, and pay to him the said 2½ per cent.

SEC. 10. *Be it further enacted,* That subsection thirty-one (31), mentioned in the caption of this act, be amended so as to read as follows: "Each and every chiropodist and veterinary surgeon practicing his profession in the Taxing District shall pay annually ten dollars.

SEC. 11. *Be it further enacted,* That subsection thirty-five, mentioned in the caption of this act, be stricken out, and the following inserted in the room and stead thereof as subsection thirty-five (35): Every street car company shall pay a tax of twenty dollars ($20) on every car used by said company, and they shall be required to get a number from the register and keep the same on each car taxed in the same manner and under like penalties as

drays and other vehicles are now required to be numbered.

SEC. 12. *Be it further enacted,* That subsection thirty-six (36), mentioned in the caption of this act, be amended to read as follows: "Steamboat agents, and the agent of railroad companies, other than the proper officers of the railroads terminating at the Taxing District, shall pay a privilege tax of $25 per annum, and a special privilege tax shall be paid for each road represented.

SEC. 13 *Be it further enacted,* That subsection thirty-seven (37), mentioned in the caption of this act, be amended to read as follows: Express companies and railroads having an express department, or engaging in the express business on account of themselves or others, transporting goods to distant points, shall pay an annual tax of ($250) two hundred and fifty dollars, besides the tax on vehicles.

SEC. 14. *Be it further enacted,* That subsection forty-six (46), mentioned in the caption of this act, be amended to read as follows: Each and every telegraph and telephone company having an office in the Taxing District shall pay annually the sum of ($250) two hundred and fifty dollars.

SEC. 15. *Be it further enacted,* That subsection forty-nine (49), mentioned in the caption of this act, be amended to read as follows: Each sewing machine establishment or agency the sum of ($75) seventy-five dollars.

SEC. 16. *Be it further enacted,* That subsection fifty (50) mentioned in the caption of this act, be amended to read as follows: All drummers and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the County Trustee the sum of $10 per week or $25 per month for such privilege, and no license shall be issued for a longer period than three months.

SEC. 17. *Be it further enacted*, That subsection fifty-two (52), mentioned in the caption of this act, be amended to read as follows: Upon the privilege of keeping a theater, opera house, or concert hall, where theatrical entertainments are given, ($500) five hundred dollars per annum, payable quarterly in advance.

SEC. 18. *Be it further enacted*, That subsection fifty-three (53), mentioned in the caption of this act, be amended to read as follows: Upon the privilege of opening or establishing an insurance office or agency for the insurance of fire, life, or accident, in the Taxing District for companies chartered by the laws of the State of Tennessee, ($100) one hundred dollars per annum for each company represented, payable annually in advance.

SEC. 19. *Be it further enacted*, That subsection fifty-four (54), mentioned in the caption of this act, be amended to read as follows: Upon the privilege of opening or establishing an office or agency for the insurance of life, fire, or accident in the Taxing District, for companies chartered by the laws of the State of Tennessee, a privilege tax of $100 per annum, payable in advance; *Provided*, on said privilege tax a credit shall be given for the amount paid on the *ad valorem* principle.

SEC. 20. *Be it further enacted*, That section fifty-six (56), mentioned in the caption of this act, be amended to read as follows; Upon the privilege of selling goods at a boat or other water craft, and not licensed as other merchants are taxed, ($25) twenty-five dollars per annum, payable in advance.

SEC. 21. *Be it further enacted*, That subsection seventeen (17) of section seven (7) of the act mentioned in the caption of this act, be made subsection 59, and be amended to read as follows: Every dealer or person not otherwise specified in this act, whatever he may deal in, or whatever business he may follow, news dealers excepted, fifty dollars per annum, payable quarterly in advance.

SEC. 22. *Be it further enacted*, That subsection fifty-eight (58) of section seven (7) be further amended by adding the following: Every compress company ($150) one hundred and fifty dollars per annum.

SEC. 23. *Be it further enacted*, That section eight (8) of the act mentioned in the caption of this act be amended to read as follows: That there is hereby assessed a tax on all privileges not herein specially enumerated a tax equal to the tax assessed for State purposes, the same to be collected as other privilege taxes are collected, but in no event shall less than $10 be charged as a privilege tax. Any and all licenses issued shall be for the sole and exclusive benefit of the party in whose name and for whose benefit such license shall be issued, and shall not be transferable by the owner or holder thereof to any person whatever under any pretense whatever until the owner of such license shall apply to the trustee to transfer the same, which transfer shall be made by the Register of the Taxing District; *Provided*, that the owner of the same first pays all the taxes he may owe to the district on account of the business carried on for which said license is issued, whether such taxes are due on capital invested, goods on hand, or otherwise, from the date of such license up to the time such transfer is made. The fee for the transfer shall be ($2) two dollars in such case, for the use of said district.

The following extracts from Acts of 1883, show all that relates to the taxation of merchants doing business in the State of Tennessee:

ACTS OF 1883—CHAPTER CV.

SECTIONS 16, 17, 18, 19, 20—PAGE 108.

SEC. 16. *Be it further enacted*, That merchants shall pay an *ad valorem* tax upon the capital invested in their business equal to that levied on taxable property, and

the term merchants as used in this act includes all persons or copartnerships engaged in trading or dealing in any kinds of goods, wares and merchandise, either on land or in any steamboat, wharf-boat or other craft, stationed or plying in the waters of this State, and confectioners; and whether such goods, wares and merchandise be kept on hand for sale or the same be purchased and delivered for profit as ordered. But nothing in this act contained shall in any wise affect the collection of privilege taxes upon the vocations declared by this act to be privileges.

SEC. 17. *Be it further enacted*, That no merchant shall commence and continue a business in any county of this State without obtaining license from the Clerk of such county, in accordance with the provisions of this act, and every person or individual member of any copartnership so offending shall be subject to prosecution for each day's violation of the law, and on conviction shall be fined not less than one hundred dollars for each offense.

SEC. 18. *Be it further enacted*, That every merchant applying for license shall, before receiving the same, execute a bond to the State, with good security, to be approved by the Clerk of the County Court, in the sum of one thousand dollars, conditioned that such merchant will render to the Clerk issuing the license at the end of twelve months from the date of the bond, a true statement under the oath prescribed by this act of the amount of capital invested in such business during said twelve months, and will pay to the Clerk the tax thereon. For taking the bonds and issuing the license the Clerk shall be entitled to seventy-five cents, to be paid at the time of issuance.

SEC. 19. *Be it further enacted*, That any merchant continuing in business shall renew his license annually, and no license shall authorize merchandising out of the county where issued, nor for a longer period than one year.

SEC. 20. *Be it further enacted,* That at the expiration of twelve months from the date of his bond, or at the expiration of his license, each merchant shall file with the County Court Clerk, by whom the license was issued, a statement under oath, showing:

1. All capital invested in his stock of goods, wares and merchandise, not otherwise reported as hereafter required, to be estimated at not less than the cash value of the largest amount of such goods, wares and merchandise on hand at any one time during the preceding twelve months.

2. All capital employed during the preceding twelve months in any manner of trading in which there is no stock of goods, wares and merchandise kept on hand for sale, and the aggregate capital so reported shall be deemed the taxable capital of such merchant, upon which he shall pay to the Clerk the same tax as levied upon real estate and other taxable property for State and county purposes; and the report herein required shall be sworn to by that member of any copartnership or mercantile firm who is most thoroughly acquainted with such business. The word "capital" as used in the foregoing sections shall be construed so as to mean the largest amount of stock on hand at any one time in the year where it is offered for sale. *Provided,* that if the report herein required to be made under oath to the Clerk of the County Court be objected to by the said Clerk or by the District Attorney of the judicial district, it shall be the duty of the said Clerk, under the direction of the said District Attorney, to issue citation to the person or firm making such report, commanding such person or firm to appear before said Clerk within five days from the date of the issuance of citation to show cause why such report shall not be revised and corrected, and the said Clerk shall be empowered to issue subpœnas for witnesses to appear before him and testify under oath to be administered by said Clerk or his lawful deputy

touching the correctness or incorrectness of such report; *And provided further*, that it shall be the duty of said Clerk, after a full investigation, to correct and audit said report.

ALSO SECTION 46, ACTS OF 1883,

CHAPTER CV—PAGE 116.

SEC. 46. *Be it further enacted*, That the occupations and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license, are the following, viz: Merchants, commission (wholesale and retail), auctioneers, cigar stands, plumbers and gas fitters, artists and architects, photographers, brewers, banks or banking, brokers of all kinds, butchers, bagatelle tables, billiard tables, Jenny Lind and pool tables, circuses, menageries, flying jennies, exhibitions for profit, sleight of hand and legerdemain, hacks, carriages, drays and wheeled vehicles run for profit, except farm wagons; hucksters and sample sellers, claim agents, lumber dealers, stock yards and sale stables, fruit stands, shooting grlleries, hotels or taverns, restaurants or public eating houses and boarding-houses keeping transient customers for pay; express companies, express wagons and carts, transfer wagons, intelligence offices and keepers, each; the business of insurance, insurance agents; livery stables, sale stables, omnibuses; peddlers of patent rights, peddlers of patent medicines and peddlers in lightning rods and nostrums, peddlers of merchandise; pawnbrokers; liquor dealers, whether liquors be spiritous, vinous or malt, (wholesale or retail); skating rinks, steam ferries, sewing machines, selling by sample; dealing in securities, shaving notes; theatres, telegraphs, ten pin alleys, variety establishments, commission brokers, dealers in stocks and bonds (other than brokers), dealers in county certificates or warrants, sleeping car companies, cotton compress companies, water works companies,

telephone companies, gas companies and electric companies, hotels kept as summer resorts, and dealers in futures; all parks kept for pay, and railroad tickets. *Provided*, the term "dealers in futures" shall not include purchases made for actual delivery and the deliveries are made according to contract.

ACTS OF 1883—CHAPTER CVI.

SECTION 3—PAGE 128

The following is the Merchants Privilege Tax for State and County purposes in force at the commencement of this cause, which is paid in addition to the *ad valorem* tax referred to above :

SEC. 3. *Be it further enacted*, That merchants shall pay an *ad valorem* tax upon the capital invested by them of forty cents on each one hundred dollars, a privilege tax of thirty cents on each one hundred dollars' worth of taxable property. *Provided*, that such privilege tax shall in no case be less than five dollars, and they shall pay a privilege tax of ten cents of each one hundred dollars of their capital so invested for school purposes.

CONSTITUTION OF THE STATE OF TENNESSEE—ARTICLE 2.

SEC. 28. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than

any other species of property of the same value. But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise, sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The Legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. * * * * *

The foregoing includes all the statute law, both for State and county and Taxing District, embraced in the revenue system of the city of Memphis, Tennessee, applicable to the above cause.

J. P. Wassler
For deft. in error.

Luke E. Wright
For pltff in Error.

120-459

FILED
JAN 8 1886
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1235.

SABIN ROBBINS, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

SABIN ROBBINS,
PLAINTIFF IN ERROR,

vs. } No. 1235.

THE TAXING DISTRICT OF SHELBY COUNTY,
DEFENDANT IN ERROR.

WRIGHT & FOLKES,
F. T. EDMONDSON, } Attorneys for Plaintiff in Error.

STATEMENT.

The Act of Tennessee Legislature of January 31st, 1879, (ch. 10, Session Acts), abolished the charter of the city of Memphis, and by an act of same date (ch. 11), in substance, created the Taxing District of Shelby County as its successor, as was decided by the Supreme Court of Tennessee, in the case of O'Connor vs. Memphis, 6 Lea, 730. The act of April 4, 1881, which is amendatory of the said act of 1879, and provides means for the support of said Taxing District, among other things enacts, at sub-section 16, "That all drummers and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month for such privilege, and no license shall be issued for a longer period than three months." Section 23 of said act provides that "there is hereby assessed a tax on all privileges not herein specially enumerated—a tax equal to the tax assessed for State purposes, etc."

The Act of 1883, chapter 105, section 16, enacts "That merchants shall pay an ad valorem tax upon the capital invested in their business equal to that levied on taxable property, and the term merchants, as used in this Act, includes all persons or co-partnerships engaged in trading or dealing in any kind of goods, wares and merchandise." Section 17 enacts, "That no merchant shall commence and continue a business in any county of this State without obtaining a license, etc." Section 18 enacts, "That every merchant applying for license, shall, before receiving the same, execute a bond to the State, with good security, in the sum of one thousand dollars, conditional that such merchant will render to the clerk issuing the license, at the end of twelve months from date of the bond, a true statement, under the oath prescribed by this Act, of the amount of capital invested in such business during said twelve months, and will pay to the clerk the tax thereon. For taking the bond and issuing the license, the clerk shall be entitled to seventy-five cents, to be paid at the time of issuance." Section 19 enacts, "That any merchant continuing in business, shall renew his license annually, etc." Section 20 enacts, "That at the expiration of twelve months from the date of his bond, or at the expiration of his license, each merchant shall file with the county court clerk by whom the license was issued, a statement under oath showing:

First—"All capital invested in his stock of goods, etc."

Second—"All capital employed during the preceding twelve months in any manner of trading in which there is no stock of goods, etc., kept on hand for sale, and the aggregate capital so reported shall be deemed the taxable capital of such merchant, upon which he shall pay to the clerk the same tax as levied upon real estate and other taxable property, for State and county purposes, etc."

The plaintiff in error, Sabin Robbins, is a citizen of Ohio, and employed by the firm of Ross, Robbins & Co., also citizens of Ohio, engaged in the business of selling books, paper, stationery, etc., in the city of Cincinnati, in said State, as a drummer or traveling agent to solicit orders for them. Whilst

so engaged in his said employment, in 1884, in said Taxing District, he was arrested for a failure to take out license as required by section 16, of said Act of April 4, 1881, by the police thereof; taken before the president of said Taxing District; found guilty of offense of drumming without a license, and fined therefor, from which he appealed to the Circuit Court of said county which affirmed the sentence so imposed, from which he appealed to the Supreme Court of the State which also affirmed the judgment of the court below, and he has now sued out a writ of error from this honorable court. The sole question involved is the constitutionality of said section 16, of said act of April 4, 1881, the plaintiff in error contending that the same is unconstitutional and void. (See page 5 printed Record).

BRIEF AND ARGUMENT.

I.

Article 4, section 2, of the constitution of the United States, provides that "the citizens of each State shall be entitled to, all privileges and immunities of citizens in the several States."

Said section 16 is clearly violative of this clause. It is a manifest discrimination in favor of merchants who have licensed houses of business in said Taxing District, and against persons who are non-residents and have no such licensed house, who wish to sell goods therein, in the following particulars:

First—The merchant who has a licensed house, *i. e.*, takes out license to do business in the Taxing District, receives a license which authorizes him to do business for the period of twelve months.

Second—He is required to pay a fee for such license at the time of issuance, and pays no further fee during said period of twelve months.

Third—At the expiration of twelve months he is required, under oath, to report the amount of capital employed during

said period, in the manner provided by said act, and to pay a tax thereon, *but pays no tax whatever until the end of said period*, whilst the person who has no licensed house of business in said Taxing District, and who offers to sell his goods therein by sample, or through the medium of an agent or drummer, is not allowed to take out a license for a longer period than three months; thus requiring four licenses in each twelve months and four license fees. In addition, he is required to pay $10 per week, or $25 per month, without regard to the amount of capital employed or goods sold, and, indeed, whether he sells any goods or not. He is required to take out the license and pay the tax before he can *offer* any of his goods for sale, and, of course, before he can know whether he will sell or not. In the case at bar, plaintiff, as the agent of his employers, a Cincinnati firm of merchants, is required to pay in advance this discriminative and burthensome tax before he can offer his goods for sale or show his samples, whilst the merchant who has a licensed house, and who is engaged in precisely the same line of business, pays no tax whatever in advance, and none until the end of twelve months, when he pays upon the capital employed.

If the plaintiff were allowed to take out a license as merchant, give his bond, and report and pay at the expiration of twelve months, there would be some appearance of impartiality: but he is not allowed to do this unless he *establishes a licensed house*. The purpose of such a requirement cannot be mistaken. Its object is, plainly, to make a discrimination against the non-resident, and thereby prevent competition between him and the resident merchant. If the power to make such discrimination as is here attempted exists in the State Legislature, then it is without limitation, and such burdens and restrictions can and will be imposed upon the merchants and manufacturers of the great commercial cities of the Union, as a condition to their doing business, as will drive them from many of the States.

The fact that the legislation complained of does not, in so many words, discriminate cannot aid it. Courts look at the purpose and result, and not at the form of expression. The

most formidable assaults upon constitutional barriers are often made in disguise, and are the more dangerous, because insidious. Attempts like this, at one time or another, have been made by nearly all the States, under the guise of license laws, to favor and protect their own merchants from outside competition. The heats and controversies growing out of such legislation, under the confederation, more than all other causes, made our Federal constitution a necessity. It would, however, be of little practical value if the evil sought to be remedied could be effected under the thin disguise of license laws, or taxes on privileges, or like devices.

Nor does it help the act to say that non-resident merchants are thereby placed on the same footing with merchants doing business in Tennessee outside the Taxing District. If the Legislature of a State can discriminate between its own merchants, and make arbitrary classifications for the purpose of unequal taxation, it cannot, thereby, injuriously affect the citizens of other States seeking to traffic within its borders. They are entitled to be placed with the most favored class. In short, the plaintiff is entitled as a citizen of Ohio to all the *privileges and immunities* which any citizen of Tennessee has. He has the right to exercise his vocation in Tennessee, and in every locality therein, on an equal footing with every and all merchants in his line of business. See

Ward vs. Maryland, 12 Wall, 418.
Welton vs. Missouri, 91 U. S., 275.

The opinion of the learned Supreme Court of Tennessee, in this case is reported in 13 Lea, 303.

We submit that it is fundamentally erroneous, in that it assumes that because under the peculiar laws of Tennessee and the construction given them by its Supreme Court, the Legislature can create any vocation a privilege, and can classify for the sole purpose of taxation the same vocation, it therefore follows that the Legislature, for the purpose of taxing, can classify without restriction with reference to *locality*. Assuming that this can be done as between its own citizens, whenever it is attempted

to be enforced as against citizens of other States who seek to do business within the State, the constitution of the United States forbids it.

II.

The act is in violation of that part of article 1, section 8, of the constitution of the United States, which declares that "the Congress shall have power to regulate commerce among the several States."

Congress is vested with the exclusive power to regulate commerce with foreign nations and among the States.

Mobile vs. Kimball, 102 U/S., 691.
Passenger Cases, 7 How., 283.
Gloucester Ferry Co. vs. Penn., 114 U. S., 196.

Congress has not only the right but it is the duty of Congress to take care that commerce is not obstructed by State legislation.

Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S. 1.

It is settled that a tax directly on commerce or aimed at commerce is unconstitutional.

State Freight Tax Cases, 15 Wall, 232.
State Tax R. R. Cases, 15 Wall, 284.

The effect of the act complained of is to draw a distinction between resident and non-resident merchants. Its object is not revenue, but exclusion. It allows the merchants of the Taxing District to do business on terms more favorable than non-resident merchants, and forbids the latter from coming into equal and fair competition with the former.

Not only is the tax imposed on the non-resident merchant greater in amount than upon the resident, but the very ground of the discrimination is that the non-resident has no *licensed house* of business in the Taxing District. The act, in substance, forbids all non-resident merchants from exercising their vocation in said Taxing District, on equal terms with the residnet

merchant, unless they establish a house of business therein. Failing to establish a commercial house in the Taxing District, then a heavy and discriminative tax is laid upon them, which must be paid before they can offer their goods for sale. The right to tax carries with it the right to exclude. So, that, if this act stands, the Legislature can declare that no person shall, on any terms, offer to sell goods in said District, unless he first establish a commercial house therein. As a result, the merchants and manufacturers of other States can be excluded from doing business in Tennessee. This would be intolerable.

Lucien D. Wright.
Atty for Pltff in Error.

120-459

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 1235.

SABIN ROBBINS, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

In Error to the Supreme Court of the State of Tennessee

Additional Brief and Argument for Plaintiff in Error.

LUKE E. WRIGHT,
F. T. EDMONDSON,
For Plaintiff in Error.

ADDITIONAL BRIEF

—OF—

PLAINTIFF IN ERROR.

In view of the importance of the question we have thought proper to submit an additional brief and argument upon the second assignment of error in our original brief, viz: That the act of the Tennessee Legislature of April 4th, 1881, imposing a tax on "all drummers and all persons not having a licensed house of business in the Taxing District, offering for sale or selling goods, wares or merchandise therein by sample," is in violation of Article 1, Section 8, of the Federal Constitution, which declares "The congress shall have power to regulate commerce with foreign nations and among the several States, &c."

This clause of the constitution has been perhaps more frequently invoked as a protection against obnoxious statutes of the several States of the Union than any other in the Federal compact.

The power thereby vested in Congress is one of regulation. The subject matter of the regulation is *commerce with Foreign Nations and among the States.* Every word of this most important grant to Congress is pregnant with meaning, and has been critically examined and exactly defined by this court.

Mr. Justice Field delivering the opinion of the court in Welton vs. Mo. 91 U. S., says:

"The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed

—that is the conditions upon which it shall be conducted; to determine how far it shall be free and untramelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted."

So in Pensacola Tel. company vs. West etc. Tel. company. Chief Justice Waite in delivering the opinion of the court, says: "The powers thus granted are not confined to the instrumentalities of commerce * * known or in use when the Constition was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steam boat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

These quotations with admirable precision extract the meaning of a long line of precedent decisions, and furnish us a measure for application to future cases as they arise. It may be added as a corrolary that the power to regulate may be exercised in various modes either by general rules embracing the whole subject or by specific regulations directed to minor details. It may operate either directly or indirectly as the wisdom of Congress may determine.

One of the most common methods of regulation is by the imposition of a tax. In laying this tax it is im-

material whether it be on the merchant or his agents, on his goods which are to be sold or transported, on the vehicles of transportation or the various other instrumentalities, animate or inanimate, by means of which commerce is carried on. Nor is the nomenclature used in the imposition, of the slightest importance. The tax may be called a head tax, a vocation tax. a privilege tax, a tax on tonnage, a tax on the amount of business done, &c., &c.

It all, however, in one form or another, is a regulation of commerce. See

Brown vs. Maryland, 12 Wheat, 419.
Passinger cases, 7 How, 283.
Almy vs. California, 24 How, 169.
State Railroad Tax Cases, 15 Wall, 215.
Welton vs. State, 91 U. S. 232.
Moran vs. New Orleans, 112 U. S., 69.
Walling vs. Michigan, 116 U. S., 446.
Pullman Car Company vs. Pickard, 117 U. S., 34.

Is the power thus given exclusive in Congress? and *ultra vires* of the States, or may the States in the absence of Federal action legislate on the subject?

This question has evoked more controversy than almost any other growing out of the construction of the constitution. It is a remarkable fact that for more than fifty years after the formation of the government, although time and again pressed on the Supreme Court, and eliciting from its members conflicting opinions, it remained an unsettled and vexed question. It is furthermore significant that the earliest utterances the court, when its members were composed of judges who were cotemporaries of the framers of the constitution, pointed to the conclusion that the power was exclusive in Congress. This was notably evident in the opinions in Gibbons vs. Ogden, 9 Wheat, and Brown vs. Maryland, 12 Do. There the great Chief Justice suggested and practically exhausted the argument in support of this theory. He and his colleagues

had been eye witnesses of the utter prostration of business under the Confederation, growing primarily out of conflicting State regulation as to commerce, and of the degraded and languishing state into which it had fallen and of which they so feelingly speak. They recalled that the very first movement towards an amendment of the original articles of Confederation consisted of a proposal to give Congress larger powers over commerce, and, that when the convention finally met it was the universal consensus that this matter should be committed to Congress. See

Pomeroy's Const. Law, pps 205, et. seq.
Story on Constitution, sec. 1,025, et. seq.

Under the administration of Chief Justice Taney the question took on a political hue. The contest between State and National sovereignty was transferred from the halls of Congress to the Supreme Court. In the License cases—5 How., and the Passinger cases, 7 How., the battle was fought. There was an extraordinary diversity of opinion upon the question principally discussed, and which we are now considering. There was, however, an expression by the majority of the court of the opinion in favor of an exclusive National jurisdiction over Foreign and inter-State commerce as distinguished from the exercise by the States of the control over subjects which are incidentally connected with such commerce, and yet really are police regulations. Accordingly in the succeeding case of Cooly vs. The Port Wardens, 12 How, 299, in which was involved the question whether a law of Pennsylvania establishing and regulating pilots and imposing certain duties upon masters of vessels arriving in port with reference to such pilots, was constitutional. The court in upholding the constitutionality of the Pennsylvania statute held that the power to regulate commerce includes various subjects—that as to some of these the States might legislate in the absence of Congressional action, as to others a uniform rule should be established, and that in the latter class the State could exercise no

regulation—the power being exclusive in Congress. This doctrine has never been receded from. On the contrary it has been repeatedly reannounced.

This court has had before it time and again since Cooly vs. Port Wardens, cases which involved the constitutionality of State statutes claimed to be obnoxious to Art, 1, Sec. 8.

In deciding them sometimes for and at others against these statutes—it has amplified and illustrated the rule laid down in Cooly vs. Port Wardens, as above set forth.

They may be divided into three classes:

First—Those cases which hold that the State statutes complained of are not attempts to regulate commerce.

They are quite numerous, and are generally uninstructive upon the question now under consideration.

There are several, however, which belong to this class relied on by the defendant in error in support of the Tennessee statute herein complained of.

They are:

Woodruff vs. Parham, 8 Wall, 123.
Osborne vs. Mobile,16 Wall. 479.

The first of these cases involved the validity of an ordinance of the City of Mobile, which by virtue of powers vested by its charter levied a tax on auction sales.

The plaintiff Woodruff was an auctioneer of that city, and in the exercise of his vocation sold a large amount of goods for himself and others, some of which were brought from other States. As to these last goods which were sold in unbroken packages he contended he was not liable to taxation.

The attack upon the ordinance was primarily upon the ground that it was a tax on imports.

Mr. Justice Miller in delivering the opinion of the court principally devotes his attention to answering this position, and does so beyond controversy. It is true he uses language which seems to indicate that the State might tax merchandise brought from another State, in the absence of discrimination in favor of its own products. But the case really only involved directly the right of a State to levy a vocation tax on one of its own citizens, engaged generally in the business of an auctioneer, and can be reconciled with opinions of the court subsequently rendered, and which will be referred to later, on this theory.

The case of Osborne vs. Mobile was a case also involving the constitutionality of an ordinance of the City of Mobile which levied a tax on Express and Railroad companies doing business in said city whose businsss extended beyond the State, and a smaller tax on those companies whose business was limited to the State and city. The facts were that the Southern Express company, a Georgia corporation, was doing a general express business in and beyond the State of Alabama, and had its office in Mobile. It, through its agent, Osborne, resisted the tax on the ground that it was an attempted regulation of commerce. The court held that it was not, and declared that "a tax on business carried on within the State and without discrimination between its citizens and citizens of other States might be constitutionally imposed and collected." Saying that in principle the case was the same as the State vs. Tax on Railway Gross Receipts, 15 Wall, and Woodruff vs. Parham.

It is also true the court says: "It is to be observed that Congress has never undertaken to exercise this power in any manner inconsistent with the ordinance under consideration, and there are several cases in which the court has asserted the right of the State to legislate in the absence of legislation by Congress, upon subjects over which the constitution has clothed that body with legisla-

tive authority." Citing, License cases, 5 How., 504, Wilson vs. Blackbird C. & M. Company, 2 Peters, 245; Cooley vs. Wardens, 12 How, 315.

This utterance of the court, we suppose, was intended to be understood with reference alone to the case in hand, and this supposition is strengthened by the fact that the authorities cited in support of the proposition thus broadly stated are all cases where there was an exercise by the State simply of its police power.

Indeed the court says: "It is not necessary to resort to the principles maintained in these cases for the decision of the case now before us, &c. It comes directly within the rules laid down in the case relating to tax on the gross receipts of railroads. In that case we said it is not everything that effects commerce that amounts to a regulation of it within the meaning of the consiitution * * * the license tax here was on a business carried on in Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts within the State for such transportation beyond it. It was with reference to this feature of the business that the tax was in part imposed; but it was no more a tax upon inter-State commerce than a general tax on drayage would be, because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State."

If, however, the court by what it says as to the right of the State to regulate inter-State commerce in the absence of Congressional legislation, intends to formulate the doctrine as broadly as stated, then it is respectfully submitted, it is neither supported by the authorities cited, nor by the subsequent decisions of the court.

Second—Those cases which hold that whilst the State statutes claimed to be unconstitutional are not so, because the subjects with which they deal, while in a sense a part of commerce or relating thereto are only remotely

or incidentally so, and subject to State regulation in the absence of Congressional legislation. They are quite numerous and it is deemed unnecessary to cite them.

They will be found to embrace the subjects of pilots, local harbor regulations, for safety and order of vessels therein, for improvement of harbors, bays and rivers, regulating wharfs, grants of ferry privileges, regulating inspection of tobacco, illuminating fluids, &c., regulating charges of railroads and grain elevators, and regulating sales of liquor.

It is clear that all of these subjects are generally local in character within the police powers of the State, and only indirectly relate to and affect commerce. They are of value, and are referred to only to show how and where the court has drawn the line between matters relating to Foreign and inter-State commerce upon which the States may and may not legislate.

Third—Those cases which hold that various acts of State Legislatures are unconstitutional because they attempt to regulate commerce proper by interfering with the free and untrammelled intercourse of the citizens of the different States for purposes of trade, or by imposing burdens upon the goods which are the subjects of such commerce, or upon the vehicles and agencies of their transportationfor sale or exchange. As to all matters of this character the court declares the States can have no power of regulation—it being announced as a fixed rule "that whenever the subjects in regard to which a power to regulate is asserted are in their nature National or admit of one uniform system or plan of regulation, they are exclusively in the regulating control of Congress. The more important of these cases bearing on the question now under consideration are

Ward vs. Maryland, 12 Wall., 418.
State Freight Tax Case, 15 Wall., 232.
Welton vs. Missouri, 91 U. S., 275.

Henderson vs. Mayor, 92 U. S., 269.
Moran vs. New Orleans, 112 U. S., 69.
Gloucester Ferry Company vs. Pennsylvania, 114 U. S., 196.
Walling vs. Michigan, 116 U. S. 446.
Pickard vs. Pullman & Co., 117 U. S. 34.

In the cases of Ward vs. Maryland, Welton vs. Missouri, Walling vs. Michigan, there was in each of the State statutes under review *discrimination* against the citizens of other States, hence the statutes were held invalid on that ground. They are valuable, however, for their discussion of the respective powers of the States and Congress over the subject of inter-State commerce. The first of these cases is especially valuable for the separate opinion of Mr. Justice Bradley, which is, if followed here, conclusive in favor of the plaintiff. The other cases cited have no features of discrimination, and deal with the question in its simplest form. It may be said, then, as a result of the repeated opinions of this court to be almost axiomatic, that Congress has exclusive power to regulate Foreign and inter-State commerce, within the limitations already noted. We purposely group Foreign with inter-State commerce because the grant to Congress of control over both is in the same degree and of equal extent. So the validity of the State law attempting such regulation does not depend on *whether it be wise or foolish*—it fails for want of power.

The record in this case shows that the plaintiff in error, Sabin Robins, a citizen of Ohio, is the travelling agent of a firm of manufacturers of books, papers, etc., citizens of and doing business in the City of Cincinnati, in said State. He is engaged in traveling in the State of Tennessee and other Southern States, and soliciting orders for his principals, showing samples of the goods which *they have for sale in Cincinnati.*

Is he not clearly engaged as the agent and representative of his house in carrying on inter State commerce?

It is obvious he stands on the same footing as his Ohio employers. They remain at home where their business and goods are, and send him forth to procure, in other States, purchasers for them. To tax him is to tax them. To exact from him a tax before he is permitted to ask a person in Tennessee to even look at his samples for purposes of trade, is, in effect, to say that Tennessee may forbid intercourse for purposes of traffic between her citizens and those of Ohio, unless the latter pay for the privilege. It is self-evident that intercourse in some form or other must precede Foreign, inter-state or any other kind of commerce. There must be a meeting, actual or constructive, in person, by mail, telegraph, express, or by some of the methods of inter-communication in use by the commercial men of to-day, before any trades can be consummated or business transacted. *So that the tax here sought to be levied, is a tax on intercourse. It lays the imposition at the very root of all commerce.* The Tennessee statute complained of is the same, in substance, as though it had enacted that no Ohio merchant shall sell his goods at his place of business in Ohio, to a citizen of Tennessee without paying a tax for the privilege. For, it will be noted, that the drummer does not carry with him any goods; he only takes an order on his house. The sale is not made and completed until his principals accept the order and ship the goods. Hence the transaction is simply that of a merchant in one State ordering goods from a merchant in another State.

Upon principle, the commercial agent, or drummer, as he is commonly called, stands in a more intimate relation to inter-State commerce than the steamboat, railroad or telegraph. He is the intelligent and animate force which sets these inanimate vehicles and agencies in motion.

Your Honors in Moran vs. New Orleans forbade a municipal tax on the occupation of running a tug between

New Orleans and the Gulf as being an attempted regulation of Foreign commerce.

Would a tax on the super-cargo who came in on the Foreign ship towed by the tug, as a prerequisite to his offering his cargo for sale, or on the passenger who came to negotiate a sale of goods then in another State or country stand on higher or different ground?

In Gloucester Ferry company vs. Pennsylvania this court held a law of the State unconstitutional, which sought to tax a New Jersey corporation engaged in running a ferry from a point in that State to Philadelphia, on the express ground that it was an attempted regulation of inter-State commerce—it being engaged in carrying citizens of the States to and fro. The company was protected from State taxation purely because its boats were employed in carrying the citizens of the two States who were engaged in commerce. Therefore the ferry-boat took on its non-taxable character, because of the fact that its passengers were citizens of different States engaged in inter-State commerce.

Upon what sound principle, then, could this court uphold a tax on the New Jersey merchant or his agent if he should offer to sell in Pennsylvania his home wares? That would be permitting the Ferry company carryng him to derive an immunity *because of his being a commercial traveller, which he himself would not enjoy.*

In Pickard vs. Pullman Car company the court had before it a statute of Tennessee which made the running of sleeping cars over railroads in the State when not owned by them a privilege and taxable as such. The court held the statute unconstitutional as an attempted regulation of inter-State commerce, it being a tax on inter-State travel, in so far as it was applied to sleeping cars run from points in other States into Tennessee. Here again the State is forbidden to tax, *because* the car is used

as a vehicle of inter-State commerce, and because a tax on the car is indirectly a tax on the passenger.

In point of fact a sleeping car is not a necessary vehicle of transportation. It is a mere convenience adding to the comfort of travelers. And yet the State cannot impose any burden on its owners since it is in general use, and for the reason that it furnishes an easy mode of transportation to citizens of one State passing into another.

It would be an anomaly, indeed, to exempt the car and yet permit the State to levy tribute upon the non-resident, who only used it to come for purposes of traffic, the very moment he attempted to carry out the object of his trip.

It is thoroughly settled by the court, in several of the cases above cited and in many others, that a State cannot levy a tax on the citizens of Foreign countries coming to this country, nor upon the citizens of other States coming into its limits. But would not the State by indirection do what it cannot do directly, if it were permitted to declare any offer on the part of the Foreigner or citizen of other States to have any dealings with its own citizens, a privilege? The mere coming into the State by the non-resident citizen is futile unless he can have *intercourse-commerce* with its citizens. Hence, to give him the full benefit of that freedom of intercourse which Congress has willed he shall enjoy, by failing to restrict, or impose regulations upon it—he should be protected from any imposition by the State whilst he is engaged in inter-State commerce. This view, in itself obviously sound, is given additional force by the opinion of Mr. Justice Bradley, in Ward vs. Maryland, above referred to, by the dissenting opinion of the Chief Justice and Mr. Justice Clifford, in Crandall vs. Nevada, 6 Wall., and the opinion of the court in the State freight

tax case, supra, explanatory of the majority opinion, in Crandall vs. Nevada, to which we respectfully refer without further elaboration.

The argument generally made, that legislation of the character now under consideration, bears equally upon the citizens of the State enacting, and those of other States, is of no force. Aside from the consideration that such legislation is, as already shown, ultra vires, the effect is necessarily to discriminate even when revenue is the only object. This arises from the fact that the commerce of the country is carried on in total disregard of State boundaries, which are mere mathematical lines. The merchants of those States principally engaged in manufacturing and commerce, supply in the main the citizens of the agricultural States, and in return receive from them the products of their fields. Now when a State belonging to this latter class taxes all merchants or their agents who seek to offer for sale or sell by sample within its territory having no resident wholesale merchants, or a very few who operate through commercial travelers—the result is to throw the weight of the tax upon the non-resident merchant whose agents are seeking orders within its boundaries.

In this way the citizens of one State can be prevented from engaging in commerce, unless they contribute revenue to support another State, although they have no property and carry on no business there and receive no protection or benefits under its government, or they may be excluded altogether. But this court has repeatedly held that whilst a State may for purposes of revenue, tax the persons, business and property of its own citizens, as it sees fit—it cannot tax the persons, property or business of the citizens of other States, outside of its limits. See

Gloucester Ferry company vs. Pennsylvania supra.

From what has already been said, and when the enormous volume of inter-State commerce, done through the agency of commercial travelers, is considered, it is plain their regulation is a matter of National concern—and if regulated at all that it must be by some general rule governing the whole country alike. To-day it is safe to say that three-fourths of the inter-State commerce of the Union is carried on through them. In former years, when travel was slow and expensive, the merchants of the agricultural States were compelled periodically to go to the great commercial and manufacturing cities of the East to purchase their goods. This system was burthensome alike to buyer and seller. With increased and cheapened facilities for transportation, and as commercial centers have multiplied and competition grown keen between them, the old method has been reversed. The wholesale merchant and manufacturer now send out their traveling agents to solicit and take orders from the country merchant. It has been found to be mutually beneficial.

It saves expense of travel to the latter; enables them to replenish their stocks more frequently, keeps them posted as to state of markets, and enables them to buy more cheaply. On the other hand, it enables the former to protect themselves against bad debts and keeps them frequently informed as to the financial status of their customers, and broadens the field of their operations.

It is confidently believed this court will recognize and protect a system which has become so thoroughly incorporated into the commerce of the whole country, from the vexations, hindrances and burdens sought to be imposed by State legislation.

Luke E. Wright
Atty for Plff in Error

120-489

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1235.

SABIN ROBBINS, PLAINTIFF IN ERROR,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENNESSEE.

BRIEF FOR DEFENDANT IN ERROR.

S. P. WALKER, of Counsel.

SUPREME COURT OF THE UNITED STATES.

SABIN ROBBINS,

PLAINTIFF IN ERROR,

vs. } No. .....

THE TAXING DISTRICT OF SHELBY COUNTY,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

The case comes to this court on writ of error to the Supreme Court of Tennessee, and involves the validity of the 50th sub-section of the 7th section of chapter 84, of the acts of 1879, as amended by chapter 96, section 16, of the acts of 1881. The sub-section in question is part of the act passed for the purpose of raising revenue by taxation for the Taxing District of Shelby county (formerly the city of Memphis), and reads as follows:

"All drummers, and all persons not having a regular licen-
"sed house of business in the Taxing District, offering for sale
"or selling goods, wares, or merchandise therein, by sample,
"shall be required to pay to the county trustee the sum of ten
"dollars ($10) per week, or twenty-five dollars per month for
"such privilege; and no license shall be issued for a longer
"period than three months."

Tennessee Acts of 1881, p. 114.

The plaintiff in error undertook to pursue the vocation of "drummer," in the Taxing District, without a compliance with this law; was arrested and fined in the city court; appealed to the Circuit Court of the county, in which the judgment of the

city court was affirmed; and thence appealed to the Supreme Court of the State, which court affirmed the judgment of the Circuit Court, the case being reported in

Robbins vs. Taxing District, 13 Lea, 303.

Of course, the opinion of the Supreme Court of the State is conclusive of all questions of conflict between the statute and the constitution of the State, leaving it to be determined by this court whether it, in any respect, conflicts with the constitution of the United States.

On the part of the plaintiff in error, it is contended that the statute in question is invalid, because (1), it conflicts with the 2d section and 4th article of the United States constitution, enacting that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; and (2), because it conflicts with the 8th section of the 1st article, vesting in the Congress of the United States the power to regulate commerce.

The State court deals very briefly with the Federal question, saying: "That such a tax is not a regulation of commerce "between the States is well settled. Osborne vs. Mobile, 16 "Wall., 479; Speer vs. Commonwealth, 23 Gratt, 935; ex-"parte Robinson, 5 Rep., 181; Lightburne vs. Taxing District, "4 Lea, 219; Pullman Car Co. vs. Gains, 3 Tenn. Ch., 587."

But, in discussing the question of the alleged conflict between the statute and the State constitution, it necessarily deals to a great extent with the views which are urged in this court. Therefore, we ought, perhaps, to content ourselves with a reference to the reasoning of that opinion, especially in view of the fact that the questions raised have been so frequently before this court as to now require nothing but the application of its own decisions to particular cases as they arise.

The counsel for plaintiff in error mainly rely upon the case of

Ward vs. Maryland, 12 Wall. 418.

And such suggestions as we can offer can be best made in considering that case, and in our effort to distinguish the case at

bar from it. In that case the Maryland statute imposed on resident traders a license tax, graduated upon the amount of stock in trade, and ranging from $15 to $150. Upon all traders non-resident of the State it imposed a license tax of $300.

The Tennessee statute here in question embraces, or may embrace, two classes of vocations, viz.: drummers and persons selling by sample. It is quite plain that a drummer may or may not sell by sample. Omitting so much of the sub-section in question as relates to persons selling by sample, it would read thus: "All drummers * * * * shall be required to pay to the county trustee the sum of $10 per week, "etc."

The Supreme Court of Tennessee, in the case of *Singleton vs. Fritsch*, 4 *Lea*, 96, defined drummers to be "commercial agents "who are traveling for wholesale merchants and supplying "the retail trade with goods, or rather taking orders for goods "to be shipped to the retail merchant," and holds that the sub-section in question simply lays a fixed privilege tax on the vocation of drummer.

Section 7, of the act of 1879, enacts "that the following-"named kinds of business and occupations be, and the same "are hereby declared taxable privileges, and shall be taxed as "herein provided;" and in the various sub-sections the taxable vocations and the amount of tax upon each, are enumerated. Included in the enumeration are "drummers." The statute makes no reference whatever to the place of residence of the drummer. He is equally subject to the tax whether he be a resident of the Taxing District, or a resident of some other portion of the State, or of some other State. In any and all cases the privilege tax is alike imposed. Given the vocation of drummer, and the statute applies, without any distinction or discrimination whatever. There is clearly, therefore, no violation of section 2, article 4, upon which the decision in Ward vs. Maryland was rested. The statute is not directed against the drummer's principal, but against the drummer himself, as pursuing a particular vocation declared to be a taxable privilege. But if the statute be looked upon as an effort to tax the

principal through the agent (for which view, we submit, there is no foundation), it would still be free from the objections urged against it, for that it equally applies to all drummers, without refenence to the principal's place of residence. "The "general power of the State to impose taxes, in the way of "licenses, upon all pursuits and occupations within its limits," is unquestionable.

Welton vs. State of Missouri, 91 W. S., 278.

There are certain well-defined exceptions to this general proposition; but none of them countenance the idea that the business of representing wholesale mercantile houses, as traveling agent, may not be declared a privilege, and taxed as such.

That the plaintiff in error is a drummer is admitted, and that the State has power to tax the calling in which he is engaged would seem to be as clear as if it was admitted.

II.

The State court, at one point of its opinion in this case (13 Lea, 306), says that the meaning of the statute in question is, that "any person not having a regular licensed "house of business in the district, must pay a privilege tax for "selling or offering to sell by sample in the district." And in the brief submitted for the plaintiff in error, the attack upon the statute is based exclusively upon this view of it. But it will be found that the statute as originally passed, was worded in the exact language above quoted from the opinion of the court.

Acts of 1879, ch. 84, sec. 57, sub-sec. 50.

In 1881 (ch. 96, sec. 16), the act was amended, so as to prefix the words "drummers and."

The Legislature meant something by the change. And we submit that even if the statute, as originally enacted, be obnoxious to the attacks made upon it in behalf of plaintiff in error, it is in its present form valid, at least to the extent that it imposes a vocation tax upon drummers.

At another point of the opinion of the State court, it is said:

"But this statute makes no discrimination among or between "the individuals of the class covered by it, the class being not "merchants generally, but traveling agents of non-resident "houses, doing business within the city." In other words, it construes that branch of the sub-section as if it read "and all "persons (representing principals), not having a regular house "of business, etc."

It would seem that the statute need not be confined to traveling agents selling by sample. The owner selling by sample would appear to be equally within its provisions. All persons selling by sample are required to pay the specified tax, excepting those who have regluar licensed houses of business in the district. Upon this exception the whole attack upon the statute is based, the contention being that the statute makes an unlawful discrimination between the resident merchant selling over the counter and the non-resident selling through a traveling agent and samples.

We think that we have already shown that this question does not arise upon the record, the plaintiff in error being admitted to be a drummer, and the statute applying to all drummers without exception and having no application to the merchant or principal represented by the drummer.

That proposition remains true, if it be held, as was held by the Supreme Court of Tennessee, that the amendment of 1881 neither added to nor took anything from the original act of 1879; and that both the original and amended acts simply imposed a privilege tax on drummers or traveling commercial agents, applying to all who came within the described class.

But whatever view may be taken of the statute, we submit, without further argument, that the language of this court, in Osborne vs. Mobile, 16 Wall, 479–481, is equally pertinent here: "There was no discrimination in the taxation of Alabama "between it (the plaintiff in error) and the corporations and "citizens of that State. The tax for license was the same by "whomsoever the business was transacted. There is nothing "in the case therefore which brings it within the case of *Ward* "*vs. Maryland*. It seems rather to be governed by the prin-

"ciples settled in *Woodruff vs. Parham.*" As is fully shown in the opinion of the State court, the classification of the statute is based on the character of the pursuit, and not on the fact of residence; and it is not subject to the objections that were sustained in *Ward vs. Maryland.*

S. P. Walker
For Taxing District
of Shelby County.

120-489

JAMES H. McKENNEY
ATTY. AT LAW

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 316.

SABIN ROBBINS, Plaintiff in Error,

vs.

THE TAXING DISTRICT OF SHELBY COUNTY, TENN.,
Defendant in Error.

Additional Brief for Defendant in Error

S. P. WALKER, of Counsel.

2. It was asked whether, if a person should rent and open a room for the sale of goods by sample, he would be taxable under the terms of the State law.

If the goods were his own, he would, of course, be taxable on the value of his stock, as are other merchants.

He would, if his office was a broker's office, where samples of his principal's goods were displayed, be taxable as a broker under sub-sec. 39, section 7, of the act of 1879.

See page ——, of the appendix.

He might also come within the terms of the statute immediately under discussion in this case.

3. Lastly, it is conceded, by both parties, that merchants, not coming within any of the clauses specifically enumerated in the sub-sections of section 7 of the act of 1879 and the amendment of 1881, pay the same municipal license taxes as are charged by the State, as shown in the appendix.

Whatever weight may be accorded to the argument that the statute here under discussion lays a discriminative and an unequally burdensome tax on the non-resident merchant, the question around which the great interest of the case centers, is whether that statute is a regulation of inter-state commerce.

That it is so is urged upon the ground that trade between Cincinnati and Memphis cannot, so long as this statute remains in force, be carried on, through the medium of traveling agents, except upon condition of paying tribute to the State of Tennessee; that not only trade, but all preliminary intercourse and negotiation, through personal agents, and with a view to such trade, are subjected to the burdens of the State law; and that the tax is therefore essentially a burden on commerce between the States.

Reduced to syllogistic form (as was done by counsel for the plaintiff in error), the argument amounts to this:

The State of Tennessee cannot lay a tax on commerce between it and any other State of the Union.

The principals of the plaintiff in error, through him, were engaged in such commerce, or in intercourse looking to such commerce.

Therefore a tax on the plaintiff in error, or on his principals through him, is a tax on inter-state commerce.

To test the logic of this proposition it is, or may be, necessary to determine first on whom the tax is laid. In this respect the case does not differ from that of

Walling v. Michigan, 116 U. S.

In that case the court said:

"Of course the act of 1875 does not assume to tax non-
"resident persons or firms doing business in another State.
"They are subject to taxation in the State in which they are
"located. It is the business of selling for such non-resident
"parties, or for soliciting orders for them for sale in Michigan,
"of liquors imported into that State, that is the object of tax-
"ation under the law.

* * * * * * * *

"In the one case (the tax on resident manufacturers) it is a
"single tax on the principal; in the other it is a tax, not on
"the principal, for he cannot be taxed in Michigan, but upon
"each and all of his servants and agents selling or soliciting
"orders for him."—page 459.

Starting therefore with the proposition that the tax here in question is laid upon the agent himself—the drummer—the question is whether a person who goes about from city to city and from State to State, making contracts of sale for his non-resident principal, or soliciting orders for goods to be shipped

"*eign character*, the State can impose a tax upon them, or "*upon the persons through whom the sales are effected*, the "amount of the tax will be a matter resting in her discretion."

And in *Walling v. Michigan, 116 U. S. 461*, the court, after stating the proposition that the States could undoubtedly tax vocations carried on within their limits, and after citing the numerous cases in this court to that effect, said: "None of "these cases, however, sustain the doctrine that an occupa- "tion can be taxed, *if the tax is so specialized as to operate as* "*a discriminative burden against the introduction and sale of* "*the products of another State.*"

We cite these cases, not for the propositions they embody against the validity of discriminative taxation by the States, but for the reason that, in one breath, they deny the power of the States to discriminate, but affirm their power to lay taxes on occupations carried on within their limits. Nor do we mean to argue that a tax must be discriminative in order to subject it to the objection of being a regulation of interstate commerce. *Almy v. California, 24 Howard 169*, presents a notable example to the contrary.

That legislation of the kind here in question necessarily affects commerce, by no means determines the question of its validity. This court, in the line of decisions on this clause of the Constitution, has put numerous illustrations of this proposition.

The mere fact that the general rate of taxation is higher in one State than another may affect commerce between such States.

The police powers of the States, alike with their other powers, are subordinated to the Federal Constitution; yet the mode of storing or vending gunpowder, poisons, liquors and other such articles of commerce, may be so regulated by the

State as to reduce or destroy all profitable commerce therein. The hauling of goods from warehouse to depot or wharf, and *vice versa*, is indispensable to commerce, and yet the owners of the vehicles used for such purposes are subject to both license and property taxation by the States.

Steamboats and railroad cars, and all other property used in and essential to commerce between the States, are subjected to the unlimited taxing power of the State in which they have their *situs*.

The franchise of a carrying company may be taxed by the State in which it has its domicil.

Each of these propositions has been affirmed by this court.

The License Cases, 5 How. 590.
Osborne v. Mobile, 16 Wall. 479.
Wiggins' Ferry Co. v. East St. Louis, 107 U. S. 365.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

As property, locomotives and railroad cars may be taxed; but the State cannot lay taxes solely upon the right to use them as vehicles of commerce between the States. The fact however that the taxation *increases the expenses attendant upon their use*, of itself constitutes no objection to its constitutionality.

The Delaware R. R. Tax Case, 18 Wall. 207.

So a tax on the gross receipts of a railroad company is not a tax on commerce, because "incapable of being transferred "as a burden upon the property carried from one State to "another."

Tax on Railway Gross Receipts, 15 Wall. 284.

On the other hand, it is not to be gainsaid that, apart from all considerations of the equality or inequality of a given tax, the State can lay no direct tax upon the business of transport-

ing freight and passengers, or in any manner directly tax traffic or intercourse between the States.

Almy v. California, 24 How. 169.
State Freight Tax, 15 Wall. 282.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
Pickard v. Pullman So. Car Co., 117 U. S. 34.

To undertake to extract, from these and other cases, a general statement of what is a regulation of commerce, within the meaning of the Constitution, and in the sense in which States are forbidden to make such regulation, is a task, the difficulty of which this court has often confessed.

The movement of goods, the transit of persons, the contract of affreightment may not be directly taxed; yet the income derived from the general business of which all these things are incidents may be taxed. And it would seem, if we may so say without venturing too far, that the true line of distinction between the general mass of persons, property, and business which the States have the undoubted power to tax, and that regulation of commerce which is forbidden to the States, lies in the distinction between taxing the thing itself—commerce—and taxing the means, the vehicles, the results, of that commerce. Whenever such means, vehicles, or results are otherwise within the taxing power of the State, *they are not taken out of that power by the fact that they are employed in commerce.*

The proposition may be better illustrated than stated in the abstract. Suppose, as suggested by the Chief Justice in the course of the argument, that a State should lay a license tax on all peddlers, could it be held that a peddler engaged exclusively in vending goods, the produce of another State, would be exonerated from such a tax? The goods in his pack would be taxable; *Brown v. Houston, 114 U. S. 622;* and for the same

reason he, like all other persons in the State pursuing a licensed vocation, would be subject to the license tax. The reason is that the property and the vocation are alike subjects of State taxation, and they do not cease to be so because the goods were brought from another State, or the peddler engaged in selling such goods.

But we need not go to the full length of this proposition in order to dispose of the immediate question here involved. The occupation sought to be taxed is just one step removed from commerce itself, and the question is the identical question that was involved in Osborne v. Mobile, 16 Wall., this court there holding that the State had power to tax "the making of "contracts within the State for transportation beyond it." That is exactly the business in which the plaintiff in error was engaged, viz., the making of contracts in Memphis for the sale and transportation of goods from Cincinnati.

Another and last illustration may be drawn from an inquiry by a member of the court. Counsel was asked what was the difference between the business of plying a ferry between two States, and that of the plaintiff in error. Before answering the inquiry it may be stated that the former business, *whenever within the proper taxing or legislative jurisdiction of the State*, has been held taxable.

Fanning v. Gregoire, 16 How. 524.
Conway v. Taylor's Ex'rs, 1 Black 603.
Transportation Co. v. Wheeling, 99 U. S. 273.
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365.

But whether so or not, the case of the inter-state ferry keeper is not strictly analogous to the case at bar. It would be strictly analogous to suppose the case of a license tax on steamboat agents, i. e., on persons, travelling or resident, whose business it is to solicit and procure shipments of goods and